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1 UNITED STATES DISTRICT COURT
   SOUTHERN DISTRICT OF NEW YORK
2 --x
   INTERNATIONAL BUSINESS MACHINES CORPORATION,
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                 Plaintiff,
4
5   v.   18 Civ. 1210(VB)
6   CONFERENCE
7 LINDSAY RAE MCINTYRE,
8   Defendant.
   ----------------------------------x
9
                                  United States Courthouse
10   White Plains, N.Y.
                                  February 12, 2018
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   Before: THE HONORABLE VINCENT L. BRICCETTI, District Judge
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16   APPEARANCES
17 PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
        Attorneys for Plaintiff
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   PIETRO SIGNORACCI
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        Attorneys for Defendant
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24 MORGAN, LEWIS & BOUKIUS, LLP
        Attorneys for Defendant
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1   THE DEPUTY CLERK: In the matter of International

2   Business Machines Corporation against Lindsay Rae McIntyre.

3   Will counsel please note their appearance for the

4   record.

5   MR. ATKINS: Your Honor, Robert Atkins from Paul,

6   Weiss, representing the plaintiff, IBM.

7   THE COURT: Just identify your co-counsel for the

8   record.

9   MR. ATKINS: I will.

10   My partner, Liza Velazquez; my colleague, Pietro

11   Signoracci; and my colleague, Trey Reliford.

12   THE COURT: Good morning. Or good afternoon,

13   everybody.

14   MR. DELIKAT: And for Lindsay Rae McIntyre, Mike

15   Delikat, Orrick, Herringon & Sutcliffe. With me is my partner,

16   James McQuade. And with us, also, who hopefully will ECF file

17   her application pro hac vice, is Sarah Bouchard from the

18   Morgan, Lewis firm.

19   THE COURT: Welcome to all of you.

20   And is your client here as well? That's this lady in

21   the back here?

22   MR. DELIKAT: Yes, yes.

23   THE COURT: That's Ms. McIntyre?

24   MR. DELIKAT: That's Ms. McIntyre.

25   THE COURT: Okay. Have a seat, everybody.

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1   Well, I've just had a conference with the lawyers in

2   my chambers about how to proceed in this case, and I just want

3   to quickly summarize where we are on the record.

4   I am going to sign the proposed order to show cause,

5   including a TRO, with a slight modification which I'll describe

6   in one second.

7   Having reviewed the papers submitted in support of

8   the application as well as defense counsel's opposition, I

9   think that a TRO, under these circumstances, is appropriate.

10   After all, the defendant, Ms. McIntyre, the former employee of

11   IBM, did sign a noncompete agreement, and it says that she

12   can't work in a job that's in competition with her job at IBM,

13   and there's certainly some reason to believe that the job that

14   she's about to take or wants to take with Microsoft is

15   essentially the same job as the job that she had at IBM, and so

16   arguably it is a breach of the agreement to do that. Plus,

17   there's no doubt in my mind that there is at least some

18   sensitive and confidential information that she possesses and

19   that, even if she stipulates, as she has pursuant to the

20   agreement itself, that she will not disclose any such

21   information, there is a risk that, because she's taking

22   essentially the same job at Microsoft, there's a risk of

23   disclosure of this confidential information, whether or not

24   it's intentional, and even if it's not intentional.

25   So I think that there is a basis for a finding, at

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1   least for now, anyway, both that there's a likelihood of

2   success on the merits and that there is a likelihood of

3   irreparable harm if not temporarily enjoined.

4   As far as irreparable harm is concerned, we start

5   with the fact that the defendant, Ms. McIntyre, has agreed in

6   writing that disclosure of confidential information to a

7   competitor -- Microsoft is certainly a competitor -- would

8   cause irreparable injury and that an injunction is the

9   appropriate remedy.

10   Now, this is not conclusive. I said that to the

11   lawyers in my chambers earlier. Every case turns on its own

12   facts. But that is a fact. That's one of the facts that are

13   relevant here, that is relevant here; namely, that she signed

14   an agreement in which she stipulated or she agreed that if she

15   takes a job like this, that it would create irreparable harm

16   for which an injunction is appropriate.

17   Also, in this area, generally speaking, if IBM were

18   able to prove at a preliminary injunction hearing both that she

19   is in possession of highly confidential trade secret

20   information and that there is a risk of disclosure, it seems to

21   me that, in these kinds of cases, injunctions are appropriate,

22   again, at least a temporary injunction, because it would be

23   very difficult, if not impossible, for IBM to obtain some sort

24   of money damages remedy. It's just the disclosure and the

25   impact on IBM would be too subtle and too nuanced to be able to

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1   really quantify in damages.

2   So, anyway, the point is that I am going to go ahead

3   and sign this. However, I'm making one addition to the order,

4   which was suggested by counsel. There was discussion back and

5   forth about this, but, in any event, I've agreed to add the

6   following clause. This is on the bottom of page 2, the

7   paragraph starting with the word "ordered" in clause one. It

8   says "working at or providing any services for Microsoft," and

9   I'm adding the following: "Provided, however, that

10 Ms. McIntyre may be placed on the payroll of Microsoft for

11 payroll and benefits purposes only." In other words, she can't

12 work at Microsoft, but she can be paid by Microsoft while this

13 matter is pending, at least while the TRO is pending. And I'm

14 advised by counsel for Ms. McIntyre that Microsoft will pay her

15 during this period, which I think is a good thing.

16   So it now reads: "Ordered that defendant Lindsay Rae

17 McIntyre is temporarily enjoined and restrained until the

18 hearing and determination of plaintiff's motion for a

19 preliminary injunction from, one, working at or providing any

20 services for Microsoft, provided, however, that Ms. McIntyre

21 may be placed on the payroll of Microsoft for payroll and

22 benefits purposes only." And then the rest of that paragraph

23 remains the same, that it also prohibits Ms. McIntyre from

24 soliciting any customer of IBM with which Ms. McIntyre was

25 involved as part of her job responsibilities at IBM during the

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1   last year of employment at IBM. It also prohibits her from

2   contacting any current employees of IBM for the purpose of

3   influencing them to leave IBM. And, finally, it prevents her

4   from retaining, using or disclosing IBM confidential or

5   proprietary information.

6   Now, I have strongly encouraged the parties to settle

7   this case on terms that are acceptable to both sides. Probably

8   not terms that each side would prefer, but any good settlement

9   requires a comprise. It requires a certain amount of

10   unhappiness on both sides. And I certainly have strongly urged

11   counsel to try and find that comprise that works for both

12   sides.

13   I've been advised by counsel directly that they will

14   negotiate in good faith in an effort to find a middle ground

15   here that is acceptable to both sides and a settlement to both

16   sides, which, at the end of the day, would allow Ms. McIntyre

17   to join Microsoft for all purposes; not just for payroll

18   purposes, but to actually work there. The details of that, of

19   course, remain to be negotiated. I am strongly urging and I am

20   also hopeful that counsel will be able to accomplish that.

21   In order to facilitate that or to encourage that kind

22   of discussion in the short term and cognizant of the fact that

23   this TRO presumes, I guess, that Microsoft is going to be

24   paying Ms. McIntyre, but not actually receiving any work from

25   Ms. McIntyre in the short term, I think we need to move this

1 | forward quickly as a matter of fairness to everybody.

2 | For what it's worth, Ms. McIntyre, it's not a bad

3 | result for you in the sense that I don't know what your

4 | personal circumstances are, but my guess is that you would like

5 | to be working and like to be paid for working. And you're

6 | going to be paid, at least in the short term, so that's a good

7 | thing for you.

8 | But everybody is ordered to be back here in this

9 | courtroom on February 22nd, which is a Thursday, I think

10 | Thursday of next week, at 12 noon. The only reason why you

11 | wouldn't be back here by then is if you filed a stipulation of

12 | dismissal or discontinuance prior to that time and date, but

13 | anything short of that, even if you are close to settling --

14 | well, anything short of a stipulation of discontinuance being

15 | filed prior to noon on February 22nd means that you have to be

16 | here on that day and at that time.

17 | In the meantime, there's a stay of all discovery. So

18 | there will be no discovery conducted between now and February

19 | 22nd. If the case is not settled then, on February 22nd, we'll

20 | talk further about where the case is going, including discovery

21 | or anything else that relates to the management of this case,

22 | or the preparation of this case, for a preliminary injunction

23 | hearing. And I've scheduled a preliminary injunction hearing

24 | to commence on March 12th, 2018 at 11 a.m. I've been advised

25 | by counsel that -- now I don't remember.

1   Did you say three days or four days? How long did

2   you think this would take, Mr. Atkins, if we have it? Which

3   I'm hoping we won't have it, but if we do.

4   MR. ATKINS: Three days.

5   THE COURT: Do you agree with that?

6   MR. DELIKAT: Yes, your Honor.

7   THE COURT: All right.

8   So I advised counsel that I have a very busy trial

9   schedule coming up. For what it's worth, I have approximately

10   300 pending civil cases. This is one of them. And all of the

11   people involved in those other cases expect me to pay attention

12   to their cases, as well, so I'm doing the best I can in those

13   circumstances. If I didn't have other cases, I could devote

14   full attention to this case, but I do have other cases. And

15   that, by the way, doesn't even include criminal cases, of which

16   I have about 50.

17   All right. So I'm going to have this order to show

18   cause docketed.

19   Is there anything else we need to do today,

20   Mr. Atkins?

21   MR. ATKINS: No, your Honor. Thank you.

22   THE COURT: Mr. Delikat?

23   MR. DELIKAT: No, your Honor.

24   THE COURT: All right.

25   I appreciate everyone being here. And have a good

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1   day. And I was going to say I'll see you on the 22nd, but,

2   actually, I hope I won't see you on the 22nd. I'm not being

3   mean to anybody, but that would mean that, of course, the case

4   got settled by then, so that's what I'm hoping will happen.

5   Have a good day.

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